Winona Industries, Inc. *and* International Chemical Workers Union, Local 893, AFL-CIO. Case 18-CA-6509

August 12, 1981

DECISION AND ORDER

On August 21, 1980, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Winona Industries, Inc., Winona, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: A hearing was conducted in this proceeding in Minneapolis, Minnesota, on June 25, 1980. The charge was served on Respondent on December 20, 1979, and the complaint issued on February 15, 1980. Respondent duly filed an answer to the complaint.

The issue presented in this case is whether or not Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to grant an industrial hygienist of the Union access to Respondent's plant for the purpose of evaluating health and safety conditions in the plant.[1] For the reasons given below, I conclude that Respondent violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Charging Party Union, and Respondent, I make the following:

FINDINGS OF FACT[2]

I. THE UNFAIR LABOR PRACTICE

A. *Facts*

Respondent is engaged at its plant in Winnona, Minnesota, in the manufacture of speaker cabinets and furniture. Robert Whitcomb is labor relations manager and quality assurance manager; Dennis Lubinski is manufacturing manager. The Union was certified as the exclusive bargaining representative of an appropriate unit of all full-time and regular part-time production and maintenance employees on August 17, 1973. Since then the approximately 185 employees in the unit have been covered by successive collective-bargaining agreements, the most recent being effective from May 1, 1977, until April 30, 1980. At the time of the hearing, the parties were in negotiations for a subsequent agreement. Terry Edwards is an International representative and Denise Stark is president of the Union.

The 1977 collective-bargaining agreement contains a grievance procedure culminating in binding arbitration. Also pertinent to this proceeding are a management-rights clause,[3] a work rules clause,[4] and an "Entire Agreement" clause.[5]

In addition, the agreement provides for a joint labor management health and safety committee composed of at least three representatives selected by management and at least three selected by the Union. At the time of the events with which we are concerned, the chairman of the committee was Patricia Weigel, industrial nurse and safety director of the plant. Although the committee is active, none of its members, as far as the record shows, has any training or experience in industrial hygiene or related fields.

The plant has undergone nine OSHA inspections in the last 4 years, all in response to employee complaints. The most recent was a 3-day inspection conducted on October 1, 2, and 3, 1979, during which employees and union representatives were consulted.

This dispute began with the posting of a notice to all employees by Safety Director Weigel on July 16, 1979, to the effect that wearing tank top shirts was contrary to

[1] No jurisdiction or labor organization status issue is presented here. Based on the allegations of the complaint and admissions of the answer, I conclude that Respondent meets the standards of the National Labor Relations Board for asserting jurisdiction and that International Chemical Workers Union, Local 893, AFL-CIO, is a labor organization within the meaning of the Act.

[2] Except where credibility is specifically discussed, the factual findings are based on substantially undisputed evidence.

[3] Art. VII of the *management-rights* clause states as follows:

> There shall remain vested in the Company . . . (12) the right to establish reasonable rules governing employment and working conditions.

[4] Art. XXIII of the *work rules* clause states as follows:

> Employees covered by this Agreement will observe such rules and regulations as may be established by the Company for the promotion of health, safety, and the welfare of the Company and its employees, provided such rules and regulations do not conflict with or supersede any of the terms or provisions of this Agreement.

[5] Art. XXVII of the *entire agreement* clause states as follows:

> This Agreement sets forth the entire understanding between the Company and the Union and represents the full and complete Agreement between the parties on all bargainable issues for the duration hereof. Both the Company and the Union unqualifiedly waive, for the duration of this Agreement, any obligation on the part of the other to bargain collectively with respect to any subject or matter not expressly covered by this Agreement . . . .

OSHA requirements.[6] Upon being advised by OSHA that it had no such requirement, Union President Stark so informed Manufacturing Manager Lubinski; Lubinski responded that the rule was due to "industrial dermatitis" problems. Stark, who did not know whether the rule was a dress code based on a management "moral code of ethics" or designed to deal with a problem in the factory which caused dermatitis, filed a grievance dated July 20, 1979, requesting access to the plant by Stan Eller, an industrial hygienist employed by the International Union, to test for materials harmful to the skin.

The following week, Industrial Relations Manager Whitcomb telephoned International Representative Terry Edwards to complain that the employees were not complying with the posting and to tell Edwards that the problem was a possible exposure of employees to formaldehyde in the air. Concerned about this information, which indicated that there might be health problems in the plant, Edwards passed the information along to Union President Stark, advising compliance and informing her that a meeting would be held August 7 on the grievance. At the August 7 meeting, Labor Relations Manager Whitcomb presented a written denial of the grievance on the ground that the Company had the right under articles VII and XXIII of the contract to establish rules pertaining to health and safety and reasonable rules governing employment and working conditions; Whitcomb informed the Union orally that Stan Eller would not be allowed in the plant. However, International Representative Edwards, who has no special training, was permitted to tour the plant for the purpose of investigating the grievance.

There were three more meetings between management and the Union on this matter.[7] On September 28, both parties expressed uncertainty over the existence of any health problem, and the Union explained that its request was for access by an industrial hygienist of the International Union, who was a professional qualified in areas with which the Union was concerned, possible health and safety problems from formaldehyde in the air. The Union also requested a complete list by generic names of chemicals used in the plant. Respondent took the requests under advisement.

On October 4, Edwards modified the Union's request by announcing that it would accept access by any industrial hygienist on the staff of the International Union and would not insist on designating Stan Eller. The Company suggested that, in view of the then-current OSHA inspection, it was not a good time for any union investigation and the Union agreed. International Representative Edwards followed up this meeting with a letter dated October 9 to Whitcomb in which he explained that the International Union had three industrial hygienists on its staff, that access by any of them would be acceptable, and also explained that the purpose for the Union's access request was

> . . . that the Company had made us aware of a possible health and safety problem per your publication of the new dress code in the plant posted July 16, 79. The health and safety of our members today is enough of a reason to make this request, but with the present contract expiring April 30, 1980 we need the information gained from this tour to bargain intelligently over health and safety issues.

The third meeting was held on October 5. Edwards again requested a tour by an industrial hygienist, and suggested that a proper time was after the closing conference with OSHA and before any corrections were made. Management raised some questions to which the Union responded by assuring the Company that the industrial hygienist would not talk to employees long enough to interfere with production, would take no air samples, would be accompanied by the president of the Union and an employee-member knowledgeable in each area, and any problem discovered would be handled through the Company before OSHA was contacted. The Union offered to supply names of the companies where industrial hygienist inspections had been conducted, and the Company's representatives agreed to talk to top management about granting an industrial hygienist access to the plant.

In response to the Union's request for a list of chemicals used in the plant, Respondent provided material data safety sheets of two of its suppliers which, however, were, to the Union's knowledge, nonspecific and incomplete. The Union did not provide Respondent with the names of other companies which had permitted industrial hygienist inspections. The tank top issue was referred to the joint labor management health and safety committee where, according to Union President Stark, it "is being taken care of," although it still is not completely settled.

During its early October inspection, OSHA investigators tested for formaldehyde fumes by taking air samples; its report stated that minimal OSHA standards were met.

Industrial hygienist Anne Gwinn described the basic qualifications of industrial hygienists on the staff of the International Union to be a bachelor's degree in either biology, chemistry, or engineering plus a master's degree in industrial hygiene and some work experience in the field. The method of operation is to get as much information as possible before going into the plant such as a list of chemicals being used; the hygienist also meets with employees beforehand and discusses their specific health problems. In addition, the employees describe the production process to enable the hygienist to minimize disruption. Arriving at the plant, the hygienist meets with management and explains what she is going to do. Representatives of management and the Union accompany the hygienist on her tour of the plant. Gwinn explained:

> I first have to explain there is a difference between toxicity and hazard. A toxicity of a chemical is the ability of the chemical to cause bodily injury or damage to bodily tissue. A hazard is the probability that the bodily damage will, in fact, occur
> . . . .

[6] A proscription against tank tops had been in existence since 1973 but enforcement had been lax.

[7] Facts with respect to these meetings are based on an amalgamation of accounts given by International Representative Edwards and Respondent's negotiators, Robert Whitcomb and Leonard Grannes, in light of the probabilities.

> What we do then is not any actual sampling, because we do not have the equipment to perform this. We rely on our industrial hygiene training and our senses of sight, hearing, and smell, to determine what kind of hazards there are in the plant.
>
> What we do is look at a process, look at what chemicals are going into that process, look at what temperatures and pressures are being used, look at what type of enclosures are involved in the operation, what type of ventilation is there, local exhaust ventilation on the operation, or a general ventilation, look at what type of protective equipment the employees are wearing, whether they are wearing respirators, whether they are wearing safety goggles, or wearing other protective clothing.

Upon completion of the tour, the industrial hygienist writes a report to the union explaining what was found and what the potential health hazards are. The union uses the report in bargaining sessions with the employer.

On November 6, 1979, Labor Relations Manager Whitcomb addressed a letter to International Representative Edwards dealing with the request for plant access by an industrial hygienist of the Union, in which he stated, in part, as follows:

> It is our decision that to accept your request at this time would serve no useful purpose since OSHA has inspected the plant thoroughly and your people are provided the opportunity to participate in a closing meeting with the members of the local unit.
>
> Discussions with OSHA during their visit indicate that there are no problems of a major nature which would result in large capital expenditures.
>
> As we have indicated to you previously we are willing at some future date to discuss a visit by these people provided we can reach agreement on the conditions under which the visit would be conducted.

B. *Conclusions*

It is well established that an employer is obligated by the statute to provide upon request, from the exclusive representative of its employees in a bargaining unit, information relevant to the representative's proper performance of its duty to represent such employees with respect to terms and conditions of their employment.[8] Here, the Union's request was made originally in its grievance filed on July 20, 1979, and repeated at subsequent meetings on the grievance September 28, October 4 and 25, 1979, and in International Representative Edwards' letter of October 9. However, the information sought concerned health and safety conditions in the plant brought to the Union's attention by Respondent's own explanation of its reasons for posting the tank top notice,[9] and was, as the Union informed Respondent, for the Union's use in fulfilling its duty to administer the then-current collective-bargaining agreement (and in bargaining intelligently for a new collective-bargaining agreement).[10]

I cannot agree with Respondent that it was not obligated to grant access by the Union's industrial hygienist because the information sought had been furnished or was available. The suppliers' material data safety sheets provided were nonspecific and incomplete. Information obtainable by the employee-members of the health and safety committee and union officers is circumscribed by their lack of the technical training and experience possessed by an industrial hygienist who knows what to look for and how to assess possible impact on the health of the employees. And, although the investigation reports of OSHA may be available, the evidence shows that the Union's industrial hygienists follow procedures which would reveal data supplementing and expanding that obtained by OSHA investigators. Moreover, the Board has said, with regard to laws governing plant safety similar to that of OSHA:

> Such laws, like the minimum wage and a variety of governmental regulations, merely establish certain minimum requirements in their respective fields as conditions of doing business and are not intended to preempt their fields of regulation to such an extent as to exclude therefrom the concept of collective bargaining.[11]

Finally, Labor Relations Manager Whitcomb's letter of November 6, 1979, must be construed as a refusal of the Union's request to permit access. There is no merit to Respondent's contention that all it was required to do was bargain and that it met this obligation by its meetings and discussions with the Union. Although the matters discussed at those meetings—selection of the indus-

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[8] *Detroit Edison Company*, 218 NLRB 1024, 1033 (1975), enfd. 560 F.2d 722 (6th Cir. 1977), reversed on other grounds 440 U.S. 301 (1979).

[9] The Board has held, with court approval, that conditions affecting health and safety of employees are terms and conditions of employment. *Gulf Power Company*, 156 NLRB 622, 626 (1966), enfd. 384 F.2d 822 (5th Cir. 1967); *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1444 (1976), modified in other respects 567 F.2d 1343 (5th Cir. 1978).

[10] See *Westinghouse Electric Corporation*, 239 NLRB 106 (1978). Labor Relations Manager Robert Whitcomb testified at the hearing that negotiations for a new collective-bargaining agreement had already included some brief discussions of plant access by an industrial hygienist.

[11] *Gulf Power Company, supra* at 626. Respondent had directed my attention to *McCulloch Corporation*, 132 NLRB 201 (1961), in which the Board upheld an employer's refusal to furnish information which was readily available in a publicly distributed handbook. That case, however, is distinguishable as the Union here wishes to obtain relevant information not contained in the material available from the Employer. As the information sought is obtainable only from an in-plant inspection by a qualified industrial hygienist, and granting access would not be burdensome to the Employer, *The Cincinnati Steel Castings Company*, 86 NLRB 592 (1949), is also distinguishable. Respondent's contention that it had no bargaining obligation to the Union with respect to its request for access by an industrial hygienist is equally without merit. (1) Notification of the Federal Mediation and Conciliation Service and other requirements of Sec. 8(d) of the Act are not applicable, as the Union was not proposing to amend or modify the contract. (2) Contrary to Respondent, the Union did, in my opinion, pursue its request through the grievance procedure. In any event, neither the grievance-arbitration provisions, the "Entire Agreement" clause, the management-rights clause, nor the joint labor management health and safety committee provision constitutes a waiver by the Union of its statutory right to the information requested. *The Procter & Gamble Manufacturing Company*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979); *Globe Stores, Inc., et al.*, 227 NLRB 1251 (1977); *Worcester Polytechnic Institute*, 213 NLRB 307 (1974). Respondent does not contend that the information sought is confidential.

trial hygienist, time and method of inspection, noninterference with production, disposition of information acquired—were appropriate subjects for bargaining, Respondent's obligation to grant the Union's request for access in circumstances such as those present here is basic and unqualified and not subject to ultimate refusal after negotiations.[12] Nor can I find merit in the contention that Respondent was merely awaiting the names of other companies whose plants had been inspected by an industrial hygienist; Whitcomb's letter made no reference to the Union's failure to provide the companies' names. The letter's denial of the request "at this time" and its expressed willingness to "discuss" the request "at some future date" subject to further bargaining, after 3 months and four meetings during which the Union modified its request and offered assurances in response to all questions raised by Respondent, amount to a refusal inconsistent with the requirements of the Act.[13]

I conclude that by effectively denying the Union's request for an in-plant inspection by an industrial hygienist designated by the Union for investigation of health and safety conditions, which was relevant to the Union's discharge of its bargaining obligation, Respondent refused to bargain in good faith and violated Section 8(a)(5) and (1) of the Act.

II. REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. I also recommend that Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, Winona Industries, Inc., Winona, Minnesota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with International Chemical Workers Union, Local 893, AFL-CIO, by denying the Union's request for an in-plant inspection by an industrial hygienist designated by the Union for investigation of health and safety conditions which are relevant to the Union's discharge of its bargaining obligations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, grant access to the plant by an industrial hygienist designated by the Union to investigate health and safety conditions.

(b) Post at its plant in Winona, Minnesota, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[12] *General Electric Company*, 199 NLRB 286, 289.

[13] *Winn-Dixie Stores, Inc., supra; General Electric Company, supra.*

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with International Chemical Workers Union, Local 893, AFL-CIO, by denying the Union's request for an in-plant inspection by an industrial hygienist designated by the Union for investigation of health and safety conditions which are relevant to the Union's discharge of its bargaining obligations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL, upon request, grant access to the plant by an industrial hygienist designated by the Union to investigate health and safety conditions.

WINONA INDUSTRIES, INC.